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Good things and small packages: lessons from Canada for the Northern Irish Constitutional Settlement

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ABSTRACT. On 22 May 1998 Northern Ireland and the Republic of Ireland held successful referenda on the so-called Good Friday Agreement that provided a proto-constitutional settlement to the violence that had plagued Ulster for almost thirty years. This article analyses the prospects for a lasting, stable settlement in Northern Ireland. Experience has shown that construction, like reform, of constitutions and constitutional frameworks in deeply divided societies is no mean task. This article draws lessons from Canada's failed Charlottetown Accord (1992) to suggest that two fatal flaws – expanding the agenda to include the demands of multiple groups, and opening the constitutional process to mass legitimisation through use of referenda – can undermine political stability and the prospect of settlement. Canada, a country that like Northern Ireland features a long string of failed constitutional settlements, provides an excellent illustration of the problems involved. As is the case in Northern Ireland, the Canadian constitutional quagmire has grown out of the imperative to reconcile the rights of an entrenched ethno-national minority with majority rule. In both countries the traditional defining cleavage is ascriptive. In both, centuries of resentment, as well as expectations raised and dashed by constitutional failure, have led to political instability. In Canada, this has meant threats to the integrity of the country itself. In Northern Ireland the consequences have been even more serious.

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Introduction

The danger of disturbing the public tranquillity by interesting too strongly the public passions is a still more serious objection against a frequent reference of constitutional questions to the decision of the whole society. James Madison, *Federalist 49*

Northern Ireland has celebrated what have been billed as two major political achievements – the Good Friday Agreement (10 April 1998)¹ and its subsequent endorsement in a ‘peace referendum’ (22 May 1998). Both have created momentum towards long-term stability and, after many false dawns, what is widely acknowledged as a break-through in a seemingly intractable problem. Neither achievement can be underestimated, either in terms of the detail of the Agreement, or its electoral support expressed in both Northern Ireland and the Irish Republic (71 per cent and 95 per cent in referenda respectively). At issue here, however, is a challenge, drawing on the Canadian experience, to the somewhat simplistic assumption that the process, thus far, will lead inexorably to political stability.

The momentous Good Friday Agreement was the culmination of a process initiated by the then Secretary of State Peter Brooke in 1989 that repeatedly faltered, but eventually led to multiparty talks (initially excluding Sinn Féin) in June 1996. Little progress was made as the delegates failed to agree on the issue of decommissioning of weapons by paramilitary organisations. Movement became possible, however, with the 1997 United Kingdom general elections.

In May 1997 a new Labour government was elected to Westminster with a landslide victory ending eighteen years of Conservative rule. The size of the Labour mandate (44 per cent vote and 419 seats) nullified the political influence exerted by the Ulster Unionist Party (UUP) over the previous administration. Meanwhile, Sinn Féin’s success in the election increased that party’s clout, and led to direct negotiations with the British government. These negotiations, according to Sinn Féin, resulted in key demands being met over four crucial issues. Sinn Féin would be admitted to multiparty talks on the same basis as other parties; those talks would be completed within a fixed time frame; the government would not require decommissioning of weapons before or during negotiations; and confidence-building measures, such as a relaxation in security and concessions for ‘political prisoners’ (those jailed for terrorist crimes) would be introduced. The result was the IRA cease-fire, and Sinn Féin’s admission to the talks. The renewal of the cease-fire (20 July 1997) was met with the same degree of surprise as its collapse in February 1996. IRA terrorists had ‘held the line’ for seventeen months before bombing London’s Docklands, killing two people and injuring many others. Sinn Féin, along with parties linked to loyalist paramilitaries, became part of the negotiating team which led to the Good Friday Agreement. The Agreement provides the blueprint for substantive constitutional construction. Yet experience has shown that construction,

like reform, of constitutions and constitutional frameworks in deeply divided societies is no mean task. This article draws lessons from Canada's failed Charlottetown Accord (1992) to suggest that two fatal flaws – expanding the agenda to include the demands of multiple groups, and opening the constitutional process to mass legitimisation through use of referenda – can undermine political stability and the prospect of settlement.

Canada, a country that like Northern Ireland features a long string of failed constitutional settlements, provides an excellent illustration of the problems involved. As is the case in Northern Ireland, the Canadian constitutional quagmire has grown out of the imperative to reconcile the rights of an entrenched ethno-national minority with majority rule. In both countries the traditional defining cleavage is ascriptive. In both, centuries of resentment, as well as expectations raised and dashed by constitutional failure, have led to political instability. In Canada, this has meant threats to the integrity of the country itself. In Northern Ireland the consequences have been even more serious.

This article unfolds in four sections. First, an argument is made about the conditions under which political stability in deeply divided societies – operationally known as consociational democracy – may be undermined through the reform or construction of liberal democratic constitutions that are insufficiently sensitive to key stabilising factors. The second section details Canada's disastrous and destabilising experiment with constitutional democracy. The third section suggests that conditions in Northern Ireland are sufficiently analogous to the Canadian case that important lessons can be learned – especially given the consequences associated with the failure of the peace process. The final section summarises the argument.

Stability in deeply divided societies

In contrast to early work in comparative politics on the maintenance of political stability (Almond 1956; Almond and Coleman, 1960; Almond and Verba 1963), consociational theory suggests that stability is possible in deeply divided societies through the skilful use of elite accommodation.² While the societal masses (or 'pillars') may remain mutually antipathetic, governing elite representatives of each pillar cooperate to ensure stable government. The theory revolves around a common desire among elites to ensure the most equitable and efficient allocation of resources in the making of public policy.

This article is based upon two basic assumptions: that some form of consociational democracy is necessary for the stable and peaceful governance of liberal democratic societies that are deeply divided;³ and that consociational democracy revolves around four inviolable conditions (C). These are, first:

C₁: All bargaining takes place among elites, who are universally considered legitimate representatives of their societal constituents.

Note that this is a fairly weak condition. It does not suggest that elites are universally supported among their constituents, merely that there exists some universally accepted selection mechanism and that elites selected are legitimate spokespersons for their constituents.

Second:

C₂: There is universal adherence to, and acceptance of, the 'rules of the game'.

Lijphart (1977: 25) suggests that there are four main rules:

- (1) Elites must eschew the inclination to construct governing coalitions of minimum winning size (Riker 1962), and instead seek broadly inclusive 'grand coalitions'.
- (2) Each member of the grand coalition must have a veto.
- (3) Resources must be divided proportionally.
- (4) A high degree of autonomy is necessary for each pillar to govern its own internal affairs.

Again, this is not a terribly controversial condition. It suggests that elites place a higher premium on political stability than they do on the benefits that could be derived from defecting from the consociational arrangement to satisfy demands of their societal constituency. In game theoretic terms, because elites may be said to be engaged in an iterated Prisoner's Dilemma, with no endpoint and a high discount parameter (Axelrod 1984), there is no incentive for any player to discontinue cooperative behaviour, provided that the status quo remains in equilibrium.

In such circumstances, due to the expectation of retaliation meeting any defection, the expected utility for each player is greater for maintaining the consociational arrangement than for satisfying societal constituents. Put differently, we can suggest a third condition:

C₃: Cooperation will be preferred to defection provided the expected utility of cooperation (typically measured in terms of political stability) is greater than the societal costs (*k*) of maintaining cooperation.

This entirely intuitive point is necessary to emphasise because it is not just a passive constraint. By virtue of C₁, elites can conspire to keep the value for '*k*' low by keeping controversial issues off the public agenda and deal with them instead in private negotiations, where the potential for policy manoeuvrability and compromise are maximised.

Finally, fourth:

C₄: There is universal recognition of those who constitute the players in the game.

This condition is similar to C₁ except that it introduces the non-controversial provision that the societal pillars represented must be universally recognised as legitimate. Indeed, in so far as one of the 'rules of the game' (C₂) is the creation of grand coalitions, this condition merely suggests that all must be aware of who the coalition members will be.

As it is applied in the extant literature, consociation typically constitutes an operating system of government. As such, it is a product of, and nested within, the constitutional order of the polity. Put differently, it evolves within a particular institutional context. However, there is nothing inherent in the logic of consociation to suggest that it cannot apply at a higher order as well, such as when the constitutional order itself stands to be constructed or significantly reformed. Indeed, Belgium is an excellent case in point. Similarly, although it has been less successful, Canada has relied on consociation in the constitutional arena for much of its history.

Reaching a consociational settlement in the constitutional arena is difficult, however, for at least two reasons. First, elite representatives of the salient societal pillars are required to adhere to the rules of the consociational game, even as the rules for the political order as a whole are being rewritten or constructed *de novo*. Second, because the stakes in the constitutional game are axiomatically high, societal groups may be less willing to grant elites exclusive control over the process (Manfredi and Lusztig 1998).

Is this problematic? This article will argue that the short answer to this question depends upon the ability of elites collectively to maintain the four conditions discussed above. Perhaps the greatest danger to consociation in the constitutional arena is that unless elites are vigilant, consociation can be mimicked by a process far less amenable to stability in deeply divided societies. Indeed, where the inviolable rules of consociation are relaxed even slightly in the constitutional arena, attempts to construct a consociational settlement may fall victim to what Russell (1993a) refers to as 'mega-constitutional' politics. The mega-constitutional threshold is reached, according to Russell, when

the constitutional question eclipses all other public issues and monopolizes the attention of the body politic. This will occur where the following three conditions hold: (1) the country attaches great importance to its written constitutional text; (2) the country has come to believe in a highly democratic constitutional process; (3) the country is deeply divided on constitutional matters. (Russell 1993a: 2; see also Russell 1994)

At what point has this shift occurred? We suggest that mega-constitutionalism is likely to replace consociation in deeply cleaved societies in the presence of either or both of two *violating conditions* (V):

V₁: Mass input: that is, where the constitutional process has been opened up to non-elites, and where the constitutional process is driven or strongly influenced by non-elites, or elites not recognized as being part of the consociational process.

And/or

V₂: Mass legitimization: that is, where constitutional bargains are subject to formal or informal ratification through popular referenda.

Under such circumstances, the prospect for a lasting, stable constitutional settlement will be bleak. Moreover, as discussed below, other more

pernicious consequences may result. Note that the point is not that referenda are destined necessarily to fail. Rather, it is that referenda have the potential to create future demands for more inclusive constitutional negotiating processes. In other words, referenda can become institutionalised, limiting the ability of elites to maintain consociational stability in the future.

Since at least part of the present exercise is prescriptive, it is reasonable to address the issue of how elites can keep the process from tipping from the consociational to the mega-constitutional. Prescriptively, the central contention of the article is that mega-constitutionalism is most likely in the presence of what might be called 'inclusive institutions'. Such institutions have the potential to open up the constitutional process to non-elites, thus not only violating the core conditions of consociationalism, but making the call for mass input and legitimisation that much more difficult for elites to resist.

Inclusive institutions

The consociational process is intricately bound to the institutional structure of the state. Indeed, institutions play a key role in determining which societal elements will be privileged, and by extension, which elites will be the 'players' in the consociational game. In the quintessential consociational democracy – the Netherlands (at least prior to the breakdown of the religious pillars in the late 1960s) – the critical institution was the electoral system, which ensured that the governing elites proportionally reflected the most salient social divisions. Other consociational countries have relied on different institutional structures, such as federalism, to ensure that the groups considered to be the most politically salient at the time of institutional construction are adequately represented.⁴

Most democracies, including consociational ones, have institutional structures that may be considered non-inclusive. That is, they provide for representation of a finite number of societal interests. In addition to the electoral system⁵ and institutions of federalism, such non-inclusive structures include institutions of mixed government based on the European estate system, and institutions associated with social corporatism.

Some institutional structures, however, may be conceptualised as *inclusive*; that is, they provide for representation of an infinite number of actors.⁶ Put differently, certain institutions provide constitutional status – or 'recognition in a hierarchy that lets those who hold it stake preferential claims on the resources of the state or on the political process itself' (Brodie 1996: 253). The quintessential example of an inclusive institution is the codified bill of rights.

Bills of rights are inclusive in so far as they grant status in two ways. First, they typically enumerate certain categories of citizen as eligible for specific constitutional protection. Second, even where they scrupulously

avoid the enumeration of specific rights, they are axiomatically hostage to judicial interpretation that can create what in the American context are known as 'suspect' classifications – that is, conditions under which unnamed discrete and insular minorities can qualify for judicial recognition as status-holding minorities.⁷ In this way, any number of groups can mobilise for status.

Whether bestowed by inclusive or non-inclusive institutions, constitutional status provides the incentive for groups (and in some cases, governments) that hold it to preserve and seek to enhance such status. Moreover, where the opportunity arises to acquire status – during periods of constitutional renewal where inclusive institutions are in place – the incentive exists for groups to mobilise.⁸ Thus, in deeply divided societies, such periods of constitutional renewal represent periods of threat to the consociational process. The threat is even greater if referenda are included in the process. As James Madison noted centuries ago (and, as indeed was borne out in Canada during the 1992 Charlottetown Accord referendum), periodic episodes of public input into the constitutional process engenders 'pernicious factions that might not otherwise come into existence' (Madison 1981: 22).

Where inclusive institutions exist, the threat to consociationalism is great. New elites emerge to pursue their constituents' claim for constitutional status. At the very least, these new elites make a credible demand to be represented at the constitutional bargaining table. This creates debate and ambiguity as to who the relevant constitutional actors are (potentially violating C₄). Finally, because new elites may find the bargaining process difficult to break into, they may seek to enhance their legitimacy by appealing for popular referenda. Where they are successful, the process can be said to have entered the realm of mega-constitutional politics. The stability of the consociational process, in other words, will have been sacrificed for the passion and disruption of the mega-constitutional.

The Canadian context

Canada provides an excellent illustration of the consequences associated with the breakdown of the consociational process, and the emergence of mega-constitutionalism. The Canadian constitutional landscape is littered with failed attempts to create a constitutional identity acceptable to all regions of the country – especially the overwhelmingly francophone province of Quebec. Through the Fulton-Favreau Accord of 1964, the 1971 Victoria Charter, the partially successful 1981 Patriation Accord, the 1987 Meech Lake Accord and finally the recent Charlottetown Accord (1992), Canada has attempted to reform its constitution to include an indigenous amending formula and a means of coming to terms with its traditionally recognised cultural duality.⁹

Over the past thirty years this perpetual bout of constitutional introspection has led to the creation of three distinct constitutional pillars, each of which has been accommodated within a consociational arrangement. These pillars, respectively, are associated with Canadian nationalism, Quebec sovereignty and Western alienation.¹⁰ However, a fourth such pillar, that has emerged since the early 1990s, has brought Canada into the realm of mega-constitutional politics.

This fourth, 'minoritarian', pillar has not been accommodated successfully within the consociational process. Indeed, it is less an orientation than an aggregation of interests that have fared poorly under the majoritarian parliamentary system, and instead have taken advantage of the Charter of Rights and Freedoms to carve out a constitutional niche for themselves (Cairns 1990). The Charter has created a sense of appropriation on the part of citizens over the constitution. Not only has it given citizens a greater stake in the constitution, and by extension the constitutional process, but it has granted even larger stakes to groups that have been given specific interests and rights – or constitutional status. Women, aboriginals and what Cairns calls 'third-force Canadians' (those of non-English or French backgrounds) all have been granted status by virtue of provisions such as sections 25, 27 and 28. In addition, judicial interpretation of the equality provision (section 15) ensures that any group can claim charter protection if it manifestly constitutes a 'distinct and insular minority'. As a result, groups representing disabled Canadians, immigrants and visible minorities, all have sought to have their concerns addressed constitutionally (Lusztig 1994).

In sum, the new constitutional pluralism that has accompanied the post-Charter era in Canada has created a new dimension in a constitutional dialogue that previously was concerned solely with the intergovernmental division of powers. The notion of group status and citizen propriety over the constitution has meant that the traditional consociational process of constitutional bargaining has been increasingly seen as illegitimate. The perception is that '11 white men in a locked room' cannot represent the constitutional interests of the ever-expanding list of constitutional clients. As a result, significant procedural changes characterised constitutional politics in the aftermath of the failed Meech Lake Accord.

The Meech Lake Accord, signed in April 1987, witnessed the start of the demise (at least for the foreseeable future) of consociational constitutional bargaining in Canada. The Accord was a surprise announcement, negotiated behind closed doors, with no public input sought or received. However, over the course of the three-year ratification period, in which each provincial legislature, as well as the national parliament, had to approve the agreement, the Accord was attacked for failure to reflect adequately the new social cleavages that characterised the Canadian constitutional dialogue. Indeed, the Meech Lake Accord, both procedurally and substantively, ignored the fact that certain groups, largely women, aboriginals and linguistic minorities, had been successful in utilising the Charter of Rights

and Freedoms as an *entrée* into the constitutional arena (Simeon 1990; Cairns 1995; Stein 1995).

The perception, following the failure of Meech Lake, that the Constitution could no longer be the exclusive preserve of governments, stimulated the government of Brian Mulroney to open the constitutional process to increased popular participation. To this end a number of federal commissions and parliamentary committees of investigation were set up to canvass the views of 'ordinary' Canadians with respect to the Constitution. In consequence, it was argued, elites would be in a position to reflect better the aspirations of the constituents they represented. In order to ensure this, it was ultimately determined that the constitutional settlement reached would be subject to (unofficial) popular ratification through a referendum.

Another innovation stimulated by the failure of the Meech Lake Accord was the opening of the constitutional bargaining process. Heretofore the exclusive preserve of the eleven first ministers, what became known as the Charlottetown negotiations expanded to include the leaders of the Northwest Territories and the Yukon, as well as representatives of four aboriginal groups.¹¹

The procedural changes in the Charlottetown Round proved too great a strain for the consociational process to bear. Indeed, the process violated almost all the stipulated conditions for consociationalism. The first critical problem came early in the process. To many groups, the composition of the players at the constitutional negotiating table seemed arbitrary and unjust. In August 1992, even before the seventeen bargaining elites agreed to the Charlottetown Accord, the Native Women's Association of Canada (NWAC) obtained a (short-lived) injunction in the Federal Court of Canada to halt the negotiations because none of the four aboriginal groups at the table represented NWAC's interests. Thus, even before the Accord was reached, C₁ had been violated.

Other problems quickly followed. Groups that had been excluded from the constitutional bargaining process reacted bitterly to their exclusion. The most prominent women's organisation in the country, the National Action Committee on the Status of Women (NAC), came out against the Accord, in part because women had not been represented at the negotiating table. Women (as well as other groups representing linguistic minorities, immigrant and visible minorities, and the handicapped) were disillusioned that although, like natives, the source of their legal constitutional status derived from the Charter of Rights and Freedoms, they were not accorded the same pride of place at the Charlottetown negotiations. Moreover, since roughly one-third of the massive (60 amendment) Charlottetown Accord was devoted to aboriginal issues, the cost of exclusion seemed tangible and very high. The apparently arbitrary decision to reward certain recent status holders with a seat at the constitutional bargaining table, while excluding others, challenged, if not violated C₄.

Ironically, the most vulnerable condition, C₃, was on its face not violated.

Despite the passions that raged during the Charlottetown debate, the seventeen constitutional elites were able to reach an accord. On the other hand, the high *k*-score involved in the process led to other problems. Specifically, it meant that elites were not able to ensure the compliance of their constituent populations to the Accord. Because of the requirement of mass legitimisation through referendum, this proved fatal to the success of the enterprise. The amount of compromise necessary to forge agreement among elites representing such a vast array of constitutional world views made the Charlottetown unpalatable to the majority of Canadians.¹² Indeed, the emergence of rival elites (that is, those not present at the constitutional bargaining table), representing all of the constitutional pillars, as opinion leaders during the Charlottetown referendum debate, once again constituted a serious challenge to C₁ in the Charlottetown Round.¹³

The failure of Charlottetown is illustrative of how destabilising the shift from consociationalism to mega-constitutionalism can be. Within the aboriginal community, renewed talks on aboriginal self-government have been fruitless, and Indian bands in British Columbia, Ontario and New Brunswick have indicated their frustration with armed road blocks and occupation of crown land. Even more perniciously, in the 1993 federal election Quebecers voted overwhelmingly for the separatist *Bloc Québécois*. Provincially, a hard-line separatist *Parti Québécois* government was elected the following year. On 30 October 1995, Quebec held a referendum on independence. The surprisingly close vote, 49.44 per cent for the Yes, 50.56 per cent for the No, pitched Canada yet again into constitutional crisis. The prospect of yet another referendum on Quebec separation looms on the not-too-distant horizon. Moreover, the damage to the Canadian economy has been severe. A lack of investor confidence in Canada's constitutional stability has kept the Canadian dollar weak through most of the decade, and has retarded the growth of an economy already hampered by high tax rates and a large public debt. Such consequences, in turn, have served to reinforce numerous groups' dissatisfaction with the status quo.

On the other hand, destabilising as the crisis has been, disaffected groups rarely have resorted to violence in Canada. Yet such a peaceful outcome can scarcely be expected where the breakdown of the consociational process occurs in deeply divided societies with a history of violent conflict. The discussion now turns to an analysis of one such society – Northern Ireland.

The Northern Ireland context

What lessons can Northern Ireland learn from Canada's futile experience with constitutional reform? While the current peace process, following the second IRA cease-fire, offers an opportunity for constitutional renewal, judged against the Canadian experience, the reform programme based on the 1995 Frameworks Document,¹⁴ the Mitchell Report,¹⁵ and the Good

Friday Agreement can be characterised as mega-constitutional and therefore unlikely to promote the conditions necessary for *long-term* political stability. The contention of this article is that elites attempting to construct an enduring Northern Irish constitutional settlement would be better served by adhering more faithfully to the consociational process that has been utilised, albeit thus far unsuccessfully, from as early as 1969, the beginning of what has been euphemistically described as 'the troubles'.¹⁶ Obviously this is a very tall order. Northern Ireland's history provides its elites with little policy manoeuvrability. However, it is our contention that this only underscores the need to adhere closely to the consociational model. Otherwise, we predict, the seeds of instability will be sown into the constitutional structure from the beginning.

The main pillars of Northern Ireland's proto-consociational experiments have been the five major political parties – the UUP, Democratic Unionist Party (DUP), Social Democratic and Labour Party (SDLP), the Alliance Party (APNI) and, most recently, Sinn Féin (SF). In addition, at least until the Good Friday Agreement was reached, the consociational process also included the governments of Great Britain and the Republic of Ireland. As in Canada, each of the pillars features rival elites with an incentive to mobilise the politically dissatisfied. The Reverend Ian Paisley of the DUP is the most prominent, although by no means isolated, example of this phenomenon in Northern Ireland.

An important antecedent to the outbreak of violence in 1969 was an attempt by then Northern Ireland Prime Minister Terence O'Neill to address Catholic accusations of widespread discrimination in housing and employment juxtaposed with gerrymandering of electoral boundaries (Whyte 1983, 1990). Such efforts to secure elite accommodation with Catholic representatives and members of the Republic of Ireland government were viewed as too conciliatory and led ultimately to his resignation in 1969 through a loss in support from the Unionist rank-and-file and his parliamentary party. As the violence increased, the Northern Ireland Parliament (Stormont) was prorogued in 1972 and powers transferred to a new British Cabinet minister, the secretary of state for Northern Ireland. This arrangement was referred to as *direct rule* from Westminster (Bew *et al.* 1979; Arthur 1987).

The first attempt to secure constitutional reform, following the introduction of direct rule, came in 1973 when a Northern Ireland Assembly was elected by proportional representation and a Power Sharing Executive formed from its members. Bargaining between elites comprising representatives of the British government, the taoiseach of the Republic of Ireland and members of the new Executive secured the so-called Sunningdale Agreement, which protected the rights of the Catholic minority by endorsing Catholics' desire to share power, and created a Council of Ireland, with members drawn from the North and South, to deal with matters of common concern. Unionist Party leader Brian Faulkner, however, could not

secure the support of his party or voters for the agreement. Opposition crystallised in the form of a general strike by the Protestant Ulster Workers' Council, that crippled the province through the control of food and electricity supplies. Grassroots Protestants made it clear through their actions that they would accept no dealings with the Republic in a Council of Ireland nor would they share power with Catholic politicians. The Power Sharing Executive collapsed in 1974 (Bew and Patterson 1985).

It was not until 1982 that the Northern Ireland secretary of State proposed 'rolling devolution' under which an elected Northern Ireland Assembly would gradually assume executive powers in proportion to politicians' willingness to share responsibility (O'Leary *et al.* 1988). Both sides had to agree on how such powers should be discharged, with the endorsement of not less than 70 per cent of the Assembly members. Although all parties fought the elections to the Assembly, the Nationalists (SDLP and Sinn Féin) boycotted it in protest against any initiative that sought internal solutions (excluding Dublin) to Northern Ireland's problems and Unionists' willingness to work exclusively on quasi-majoritarian terms. With no acceptable proposals for devolved structures emerging from the Assembly and electoral support for Sinn Féin increasing at the expense of the SDLP, the British and Irish governments signed the Anglo-Irish Agreement in 1985 (Aughey 1989; Connolly and Loughlin 1986).

The Agreement asserted that the constitutional status of Northern Ireland would not change without the consent of a majority of its inhabitants and established an Intergovernmental Conference between Britain and the Republic of Ireland as a forum within which the Irish Republic could forward views on a range of political, security and legal matters, reflective of the nationalist perspective in the North. Unionists were incensed that the Agreement had been negotiated without consulting the unionist majority, incorporated an Irish dimension and had the status of international law. The two main unionist parties, the UUP and DUP, engaged in a campaign of political disruption and demonstrations that failed to rescind the Agreement, and their relationship with government ministers plummeted to an all-time low until inter-party discussions resumed in 1991 (Knox and Connolly 1988). These were aimed at securing a consensus on a power sharing local assembly with new North-South and Anglo-Irish intergovernmental institutions. The talks got bogged down over procedural and substantive wrangling and eventually foundered.

With the breakdown in the inter-party talks, both the British and Irish governments seized the initiative and issued the Anglo-Irish Joint (Downing Street) Declaration in December 1993.¹⁷ The Joint Declaration stated that ultimate decisions on governing Northern Ireland would be made by a majority of the citizens therein, the Republic of Ireland would, as part of an overall settlement, seek to revise its constitutional claim to sovereignty over the six counties of Northern Ireland, and Britain would not block the possible reunification of Ireland, if it were backed by a majority in the

North. The Joint Declaration, set alongside a flurry of secret discussions that included an unpublished peace plan devised by the SDLP and Sinn Féin, acted as a catalyst for the IRA cease-fire and prompted the Frameworks Document published in February 1995.

Northern Ireland: the peace process?

The publication of the Frameworks Document represented a promising attempt to bring stability to Northern Ireland through nascent consociational arrangements.¹⁸ Within the Frameworks Document it was apparent that both governments attempted to secure consociational cooperation in which the expected benefits of such cooperation were greater than societal costs (*k*). Given the bloody nature of the status quo, this condition was fairly easy to satisfy. The Irish government committed itself to introducing and supporting proposals to amend articles 2 and 3 of the Irish Constitution whereby 'no territorial claim of right to jurisdiction over Northern Ireland, contrary to the will of a majority of its people is asserted' (Northern Ireland, 22 February 1995: 355–70). By the same token the British government reaffirmed that it would uphold the democratic wish of a greater number of the people of Northern Ireland on the issue of whether they prefer to support the Union, or a sovereign United Ireland. The British government was equally cognisant of either option and open to its democratic realisation. In particular, it pledged not to impede movement towards a United Ireland. These changes have been formally included in the Good Friday Agreement, whereby the British and Irish governments agreed to resolve their historical differences through the 'general and mutual acceptance of the principle of consent'.

The bargain was endorsed by proposals for non-inclusive, elite-dominated institutions in the form of a new North–South body charged with a range of consultative, harmonising and executive functions. Membership of the new body would be drawn from, and accountable to, the proposed Northern Ireland Assembly and the Irish parliament. Decisions in the body could only be taken where there was agreement between North and South. The Northern Ireland Assembly and the Irish parliament would therefore have an absolute safeguard against proposals of which it did not approve.

The Frameworks Document and subsequent Good Friday Agreement provide *prima facie* evidence, therefore, of budding consociational cooperation. They were the product of bargaining among elites, specifically British, Irish and Northern Irish politicians. The benefits of cooperation or keeping societal costs low, were also apparent. The revision of the Republic's constitutional claim over Northern Ireland, as a placatory measure for unionists, was reciprocated with the British position not to block reunification, a measure designed to appease Nationalists.

On the other hand, the promise of long-term political stability may well be undermined by certain anomalies that have the potential to violate the principles of consociationalism. Specifically, these anomalies include: the entrenchment of provisions for mass legitimisation (referenda) on the Good Friday Agreement reached between elites and the resulting instability caused by issues highlighted in the referenda campaign; a proposed bill of rights for Northern Ireland; and considerable ambiguity over who exactly the key players are in the game. We consider each in turn.

The Frameworks Document set out the parameters for the multiparty talks process and eventual agreement. The talks were described in the Frameworks Document as 'the most comprehensive attainable negotiations with democratically mandated political parties in Northern Ireland which abide exclusively by peaceful means and wish to join in dialogue on the way ahead' (*The Times*, 22 February 1995:5). Thereafter, a 'triple lock safeguard' against any proposals being imposed on Northern Ireland operated. First, proposals had to command the support of the political parties in Northern Ireland; second, proposals had to be approved by the people of Northern Ireland (and the Republic) in referenda; and third, the necessary legislation had to be passed by the United Kingdom parliament. This explicit shift away from the principles of consociation does not bode well for a long-term stable constitutional settlement in Northern Ireland. Indeed, the requirement of mass legitimisation, as the Canadian example suggests, raised popular interest in the constitutional negotiating process, and threatens to undermine one of the core conditions of consociationalism (C₃).

The so-called 'peace referenda' (in Northern Ireland and the Irish Republic) exposed several issues formally agreed between the political elites which have in the short term the potential to wreck the Good Friday Agreement and in the long term to undermine political stability. Those campaigning against the Agreement (rival elites in the DUP, UK unionists and dissident Ulster unionists) highlighted the early release of 'political' prisoners without prior decommissioning of terrorist weapons and the entry of Sinn Féin into the Executive of the new Northern Ireland Assembly. The public parading of IRA and loyalist prisoners (the Balcombe Street gang and Michael Stone respectively) in a triumphalist display prior to the referenda was seized upon by the 'No' campaigners as proof of what the Agreement meant in practice and how the victims of violence had been forgotten. The prime minister, Tony Blair, intervened to assuage doubters that subsequent legislation would establish 'objective and verifiable tests' as to whether those involved had given up violence before they could take their places in the Northern Ireland Assembly Executive or take advantage of accelerated prisoner release.

The Agreement makes a strong commitment to rights, safeguards and equality of opportunity (Strand 3: 15–16). The British government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and

remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency. Additional rights will be established beyond the ECHR to reflect the principles of mutual respect for identity and ethos of both communities and parity of esteem. Taken together these will constitute a Bill of Rights for Northern Ireland.

While, on the face of it, such an institutionalised commitment to basic rights appears both laudable and innocuous, the Canadian experience suggests otherwise. Depending on the scope of judicial interpretation of such a bill of rights, new elites with only marginal commitment to political stability may find a powerful voice within the policy and constitutional process. Indeed, there are already a number of groups with vested interests in the peace process that could exploit such institutional niches to their own, but not necessarily general, advantages. The emergence of fringe loyalist parties (the Progressive Unionist Party, PUP and the Ulster Democratic Party, UDP)¹⁹ now representing Protestant paramilitaries and in direct discussions with British and Irish government ministers, is the most obvious example of a 'new' political elite with a very limited electoral mandate holding centre stage in the evolving constitutional debate. The same is true of Sinn Féin (political wing of the IRA, with a more significant 16 per cent of the vote), much to the annoyance of mainstream constitutional unionist parties who accuse the British government of operating to their agenda. This new-found role for marginalised groups is promoted through a dual process involving a loss of confidence in 'traditional' political representatives alongside an increasing reliance on community politics. Similarly, the role played by senior Catholic and Protestant church leaders either explicitly or, more likely, implicitly, in brokering the cease-fires through direct contact with paramilitaries, or acting in the capacity of emissary or intermediary has raised their profile and ascribed to them a degree of unheralded political clout.²⁰ Some further examples include prisoners' rights groups working for the release of 'political prisoners', victims' support groups pressing for no leniency to be shown to terrorists, and community groups mobilising to capture a slice of the £240 million European Union Peace and Reconciliation Programme.²¹ It is easy to see how the political power of these, and other, group leaders could be further enhanced through the creation of a bill of rights. A further example of an 'inclusive institution' is the proposed consultative Civic Forum to be established under the terms of the Agreement (Strand 1). It will comprise representatives of the business, trade union and voluntary sectors and act as a consultative mechanism to the Assembly on social, economic and cultural issues.

There is therefore no longer universal recognition of those who constitute the key players in the bargaining process and a deep suspicion about the legitimacy of the fringe Loyalist and Republican politicians in future operation of the Assembly. In sum, the Agreement provides for mass input and the potential for inclusive institutions; both present a threat, as was

seen in Canada, to promoting constitutional stability by creating the potential to militate against a low k -score (C_3), and by creating ambiguity as to the rules of the game (C_2). Even more perniciously, perhaps, the adoption of a constitutional bill of rights may cast doubts upon those who constitute players in the consociational game (C_4).

Conclusion

Do proposals for reform contained in the Northern Ireland Agreement therefore represent a failure to establish the principles of consociation and a drift towards mega-constitutionalism oblivious of the lessons provided by the Meech and Charlottetown Accords? One clear difference is, of course, that consociation has never taken root in Northern Ireland, a fact that biases the process toward mega-constitutionalism. As a consequence, a history of terrorism creates the necessity of incorporating supporters of violence into the constitutional process. In a bid to convince the gunmen that thirty bloody years have not been in vain, fringe Loyalist and Republican parties were given *entrée* to the constitutional arena. To secure further their input at multiparty talks, and hence achieve endorsement by paramilitaries, the British government devised a complex electoral system for the new peace forum designed to ensure fringe party representation. When the political parties failed to reach a consensus on the preferred election format during proximity talks, the government imposed a constituency-based proportional representation (and an eccentric, unique province-wide list) voting system. The ability of the main constitutional parties (the bargaining elites) to secure a long-term agreement within Northern Ireland was, however, called into question by a requirement that the outcome must be endorsed through a referendum. This simply provided an opportunity for the anti-agreement lobby to whip up emotions over controversial issues. Both these moves (incorporating paramilitaries and mass legitimisation), although understandable given the yearning for peace and the frustrations of the political impasse respectively, create destabilising circumstances in which mega-constitutional conditions predominate. In other words, our point is not that the new process has the potential to make a stable polity unstable. The status quo in Northern Ireland was obviously unstable. Instead, while recognising the remarkable achievement in Northern Ireland, we question the extent to which the optimal institutional structure was constructed and can endure given insensitivity to the importance of elite accommodation and the incorporation of civic society and paramilitary representatives as a forum of mass appeal. What lessons, if any, can be learned from Canada?

One thing is patently obvious, mass legitimisation through referenda is divisive, as the 1992 Charlottetown referendum illustrates. Wresting responsibility from elites to achieve accommodation through mass input alongside

the proliferation of marginal interest groups risks disastrous destabilisation. Indeed, one of the pernicious effects of referenda is that they have a long-term destabilising effect. In other words, they are the breeding ground for future constitutional demands – either by groups that had been previously excluded from the process, or by more radical elements of existing groups.

The danger exists that the euphoria surrounding the Good Friday Agreement and the peace referendum will quickly evaporate and old hatred re-emerge, compounded by the controversies highlighted during efforts to secure mass legitimisation. Major splits already have developed within the ranks of the Ulster Unionist Party with several MPs publicly opposing their leader's (David Trimble) stance on the Agreement. Conflicting statistics emerged about the extent to which Protestants supported the Agreement in the referendum—exit polls suggested 55 per cent, whilst 'No' campaigners claimed 56 per cent of unionists opposed the deal. The campaign for the election to the 108 member Assembly will place inevitable strains on the 'Yes' alliance as parties compete for seats. The Democratic Unionist Party claimed they will make it unworkable and dissident Ulster unionists may well seek election with a view to disrupting its operation on those controversial issues which surfaced during the referendum. The spectre of two Sinn Féin ministers with executive authority operating within a cross-community decision making process (either parallel consent or a weighted majority) and the operation of a North-South Ministerial Council working on an all-Ireland basis in specified areas (e.g. tourism, agriculture, waterways) has the potential for major instability in the Unionist ranks (moderate and hard-line). Similarly, an insistence on decommissioning and an over-zealous application of the 'objective and verifiable' tests on violence for early release prisoners could cause problems for the extremists (loyalist and republican).

While it is important to note that the mass commitment to peace in Northern Ireland, after thirty years of violence, is likely to be greater than popular commitment to constitutional reconciliation in Canada, the consequences of failure also are far greater. The prospect of 'capture' of the constitutional process by groups not committed to peace and stability is greatly enhanced if such groups are given a legitimate *entrée* into the process through mass legitimisation and inclusive institutions. Indeed, Canada's experience of constitutional reform has shown that such instruments of constitutional democracy are by no means as benign as they appear. Canada should have provided valuable lessons, instead Northern Ireland appears to be on the verge of replicating mistakes made.

Notes

1 The main elements of the Agreement are:

Northern Ireland is part of the United Kingdom and will stay that way for as long as that is the wish of a majority of the people who live there. If the people of Northern Ireland were

formally to consent to the establishment of a United Ireland, the government of the day would bring forward proposals, in consultation with the Irish government, to give effect to that wish. The Irish government will amend the Irish Constitution to bring it into line with this understanding, and the necessary changes will be made to British constitutional legislation.

There will be greater democratic accountability in Northern Ireland through the devolution of a wide range of executive and legislative powers to a Northern Ireland Assembly. Posts of executive authority will be shared on a proportional basis and safeguards will be in place to protect the interests of both main parts of the community.

There will be a North-South Ministerial Council bringing together those with executive authority, North and South, to work together by agreement on matters of mutual interest. Those participating on the Council will be mandated by and remain accountable to the Assembly and the Irish parliament. There will be a British-Irish Council to bring together the two governments and representatives of devolved administrations in Northern Ireland, Scotland and Wales, and from the Channel Islands and the Isle of Man.

There will be a new British-Irish Agreement to replace the Anglo-Irish Agreement signed in November 1985. This sets out the new shared understanding on constitutional matters. It also creates a new British-Irish Intergovernmental Conference which will deal with all bilateral issues between the two governments.

The Agreement also includes a range of measures to enhance the proper protection of basic human rights including a new independent Human Rights Commission in Northern Ireland to consult and advise on the scope for defining rights supplementary to those in the European Convention on Human Rights which the government are already in the process of incorporating into UK law.

2 Consociationalism is a term and concept developed by Lijphart. See Lijphart (1968, 1977); for more on the theory see Noel (1971), McRae (1974), Barry (1989), Tsebelis (1990), McGarry and O'Leary (1995).

3 Deeply divided societies are operationalised as those in which the dominant lines of social cleavage are 'pre-modern' – that is, based on language, ethnicity or religion. Note that political stability in non-liberal democratic societies can be achieved through less nuanced means than consociation. See for example the control model used in authoritarian societies (Lustick 1979).

4 Thus, to take one example, Canada has ensured that the various provinces are represented in non-majoritarian institutions such as the Senate, and to a greater degree in recent decades, institutionalised summit meetings between the prime minister and provincial premiers, known as First Ministers' Conferences.

5 Even proportional representation (PR) systems are non-inclusive in so far as they provide for representation of only a finite number of groups. Even fewer of these groups will be in a position to demand credibly an important role in the governance of the polity.

6 For more on inclusive institutions see Manfredi and Lusztiq (1998).

7 *United States v. Carolene Products Co.*, 304 US 144 (1938).

8 Note that the argument here is not deterministic. The coincidence of inclusive institutions and periods of constitutional renewal do not axiomatically lead to the breakdown of consociation.

9 For a good history of the Canadian constitutional process see Stein (1984) and Russell (1993b).

10 For a comprehensive discussion of these see Lusztiq (1994).

11 These groups respectively represented Status (reserve dwelling) Indians, Non-Status Indians, Inuit and Métis (those of mixed aboriginal and French blood).

12 Provincially the referendum passed only in Newfoundland, New Brunswick, Prince Edward Island and Ontario (by 49.8 per cent to 49.6 per cent); it failed in the remaining six provinces, as well as in the Yukon Territory. In addition, the best estimates indicate that aboriginals voted strongly against the Accord (Turpel 1993).

13 For more on the role of rival elites in influencing public support see Lusztiq (1994) and Canada West Foundation (1993).

14 'Frameworks for the Future' was published on 22 February 1995. It comprised two

documents: 'A Framework for Accountable Government in Northern Ireland' and 'A New Framework for Agreement', formerly referred to as the 'Joint Framework Document'. The first deals with Strand 1 talks, or agreement between parties within Northern Ireland. The second describes proposals for developing a North-South relationship (Strand 2) and an Anglo-Irish (Britain and the Republic of Ireland) agreement (Strand 3). For more on the Frameworks Document, and on its nominally consociational elements, see Lijphart (1996).

15 On 28 November 1995 the British and Irish governments launched the Twin Track Initiative, the aim of which was to create the confidence necessary for substantive all-party negotiations to begin by the end of February 1996. It established, on the one hand, an international body (chaired by former US Senator George Mitchell) to examine the decommissioning of illegal arms, and on the other, a parallel phase of preparatory talks designed to examine the basis of participation, format and agenda for all-party negotiations.

16 The application of consociational principles or power sharing to Northern Ireland has both advocates and critics. In the former category, O'Leary (1989) suggests that the most favourable conditions for power sharing (a multiple balance of power; a commonly perceived external threat or the removal of the rival threats; overarching society-wide loyalties and socioeconomic equality between the communities) are largely absent in Northern Ireland. McGarry and O'Leary (1995) point out that the various attempts to promote consociation have failed and the same fate is likely to result in the constitutional negotiations which follow the Framework Document. Chief amongst the critics of consociationalism is Barry (1991) who is concerned that applying such principles could, in fact, make things worse. He argues that there is no easy alternative to accommodation between the two communities but suggests that Britain's stance on *insisting* on a power sharing constitution in any final settlement, as a guarantee that the Catholic minority will be accommodated, makes a resolution less rather than more likely.

17 The Joint Declaration was agreed between the then Republic of Ireland taoiseach, Albert Reynolds and the British prime minister, John Major. It set out an agreed framework devised by both governments and committed them to promote cooperation at all levels on the basis of fundamental principles, undertakings, obligations under international agreements and guarantees that each government had given and reaffirmed, including Northern Ireland's statutory constitutional guarantee. It was described as the starting point of a peace process designed to culminate in a political settlement.

18 The Framework Document proposed a number of initiatives including provisions for:

- a 90 member Assembly for Northern Ireland elected by proportional representation, with substantial legislative and administrative powers;
- a North-South body comprising elected representatives of the Northern Ireland Assembly and the Irish parliament;
- an end to the Republic's constitutional claim over Northern Ireland;
- increased London and Dublin cooperation through a standing intergovernmental conference, but with no right to interfere with the Northern Ireland Assembly;
- separate referenda in the North and South with a majority needed in each case for proposals to proceed.

The document was presented not as an immutable blueprint, but as a contribution to the talks process, either bilaterals or round-table negotiations involving all political parties. O'Leary (1995) describes the two framework documents as 'the most far-reaching and intelligent tests yet produced by the two governments, and one must be hopeful that they will lead to fruitful negotiations'. He highlights three problems, however. The documents are: (a) vague/inconsistent in their commitments on rights, law and the judiciary; (b) devoid of methods for reaching the proposed agreement, apart from the ultimate prospect of referenda and constitutional legislation in the two sovereign parliaments; (c) short on suggestions about what happens if there are no negotiations, or no negotiations which produce an agreement which can be sold in two referenda.

19 The Progressive Unionist Party (PUP) is the successor of the Independent Unionist Group formed in 1974. It is generally accepted to be the voice of the paramilitary group, the Ulster

Volunteer Force (UVF). The Ulster Democratic Party (UDP), formerly the Ulster Loyalist Democratic Party (ULDP), was formed in 1981 and is seen to give political expression to the paramilitary group, the Ulster Defence Association (UDA). The Combined Loyalist Military Command is a united front representing the UVF and UDA (Bruce 1992, 1994).

20 For a more detailed discussion on the role played by the churches in the Northern Ireland conflict see Radford (1993); Morrow *et al.* (1994).

21 The European Commission approved a special support programme for peace and reconciliation in Northern Ireland and the border counties of Ireland in July 1995. The programme has two strategic objectives: (i) to promote the social inclusion of those who are at the margins of social and economic life; (ii) to exploit the opportunities and address the needs arising from the peace process in order to boost economic growth and advance social and economic regeneration.

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